No. 85-454 (4)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SAUL MUNOZ SIBAJA and
RAFAELA ARRIETA PORRAS, ET AL
Petitioners,

versus

DOW CHEMICAL COMPANY and
SHELL OIL COMPANY
Respondents.

REPLY BRIEF OF PETITIONERS

JANE N. SAGINAW
RUSSELL W. BUDD
BARON & BUDD
A PROFESSIONAL CORPORATION
8333 Douglas Avenue, 10th Floor
Dallas, Texas 75225
214/369-3605

ATTORNEYS FOR PETITIONERS

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REPLY BRIEF OF PETITIONERS

Petitioners pray that a Writ of Certiori issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this action on April 16, 1985, petition for rehearing thereof having been denied May 23, 1985.

STATUTE INVOLVED

This case involves application of the Rules of Decision Act, 28 U.S.C. § 1652 (1982), which provides:

> The laws of the several states, except where where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as the

> rules of decision in civil actions in the courts of the United States, in cases where they apply.

REASONS FOR GRANTING THE WRIT

In their Petition for Writ of Certiorari, Petitioners showed that the *Erie* question of whether state or federal forum non conveniens principles govern in a diversity case has been explicitly recognized but left unresolved by this Court on four previous occasions. Most recently the Court stated:

> The Court did not decide this issue because the same result would have been reached in each case under federal or state law. The lower courts in these cases reached the same conclusion: Pennsylvania and California law on forum non conveniens dismissals are virtually identical to federal law. [citation omitted] Thus, here also, we need not resolve the *Erie* question.

Piper Aircraft Co. v. Reyno, 454 U.S. 235, 248 n.13 (1981).

Unlike the previous cases, where the result reached under state or federal principles, the *Erie* problem is squarely and inescapably presented in this case. As the Court of Appeals for the Eleventh Circuit acknowledged in the opinion below:

> We recognize that the application of the federal, rather than the state, forum non conveniens rules alters the outcome of this case. Under Florida law, the plaintiffs would litigate their claims to a conclusion on the merits; under federal law, they are precluded from reaching the merits.

Sibaja v. Dow Chemical Co., 757 F.2d 1215, 1219 (11th Cir. 1985).

The *Erie* problem is thus indisputably before the Court. In their Briefs in opposition to Petition for Writ of Ceriorari, Respondents have made three arguments: that there is in fact no difference between Florida and federal forum non conveniens law; that if the *Erie* question is presented it was answered correctly by the Eleventh Circuit; and that even if a Florida court tried this case, reference to Costa Rican law would mandate dismissal. In this Reply, Petitioners will briefly address each of these arguments.

I.

THE ELEVENTH CIRCUIT'S *ERIE* HOLDING MUST BE REVIEWED BY THIS COURT

Respondents have argued to this Court, for the first time since the inception of this lawsuit, that an *Erie* analysis is not mandated by the circumstances of this case because the Florida rule of forum non conveniens does not differ from the federal rule in the present context, as both rules would require dismissal of the action. Petitioners would simply point out that the Eleventh Circuit explicitly found there would be no dismissal under Florida law (and indeed, Respondents' removal to federal court for the sole purpose of utilizing federal forum non conveniens law itself plainly belies their assertion); in any event, regardless of the merits of this proposition, such an argument should have no bearing on this Court's decision whether to review the Eleventh Circuit holding.

The decision below was founded squarely on the *Erie* doctrine and stands today as precedent that a federal court is free to disregard state law and apply the federal doctrine

of forum non conveniens to dismiss an action where the state rule would require the opposite result. In fact, the Eleventh Circuit opinion has already been cited for that precise holding by a federal district court in Alabama. *Middleton v. Dan River, Inc.*, F.Supp. , No. 83-T-11129N (M.D. Ala. Aug. 15, 1985). Moreover, the decision below can be expected to be relied upon by courts across the country for its broader *Erie* pronouncement that state law may be disregarded in favor of a federal rule at any time before a trial court meets the merits of a case because "[a] trial court only reaches the state rule of decision, relating to the character and result of the litigation, once it has decided to try the case and determine whether the Plaintiff has a valid claim for relief." *Sibaja*, 757 F.2d at 1219.

Clearly, the Eleventh Circuit based its opinion on the recognition of the chasm existing between state and federal rules of forum non conveniens in this case. It stated, without reservation, that

> We recognize that the application of the federal, rather than the state, forum non conveniens rule alters the outcome of this case. Under Florida law, the Plaintiffs would litigate their claims to a conclusion on the merits; under federal law, they are precluded from reaching the merits.

Sibaja, 757 at 1219.

This is the precedent that has been established, and the law as it now exists. Until the fundamental *Erie* problem addressed by the court below is resolved by this Court, the overreaching opinion of the Eleventh Circuit will be freely cited by any federal court attempting to circumvent the required application of state law.

II.

THE DECISION BELOW IS AN IMPERMISSIBLE APPLICATION OF *ERIE*

Respondents argue that even if there is a difference between state and federal forum non conveniens law which presents the *Erie* question, the Eleventh Circuit answered that question correctly when it held that a federal court sitting in diversity is free to disregard state forum non conveniens law and dismiss on federal common law grounds - *not* transfer for the sake of convenience - a case that the state court would have tried.

Respondents correctly state that forum non conveniens relates to the convenience and "housekeeping" of the federal judiciary as an independent system. The linchpin of the Respondents' position is that, despite the fact that the *outcome* is changed in this case by application of federal law - see *Guaranty Trust v. York*, 326 U.S. 99 (1945) - and despite the fact that application of federal law achieves for Defendants a result not possible in state court, thus effecting *inequitable administration of the laws and encouraging forum shopping* between state and federal court - see *Hanna v. Plumer*, 380 U.S. 460 (1965), and *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980) - the nature of forum non conveniens as an incident of venue, and as an "affirmative countervailing consideration" allows application of federal law. See *Byrd v. Blue Ridge Rural Electric Cooperative*, 365 U.S. 525 (1958); Respondent Shell Oil Company's Brief in Opposition to Petition of Certiorari at 11.

It is true that the federal system is a separate, independent system which, of course, may properly strive for convenience, uniformity and efficiency. Federal courts, however, have a statute for housekeeping and convenience: the transfer of venue statute, 28 U.S.C. 1404 (1980). This allows transfer

for the convenience of the parties and the courts. This prevents forum shopping between states, and affords federal courts a tool to effect docket convenience and efficiency. This Court confirmed, however, that the convenience of the federal system comes second to *Erie*, when it held that transferee courts must apply the law the transferor court would have applied - which is the law of the state in which the transferor court sits. *Van Dusen v. Barrack*, 376 U.S. 612 (1964). The lesson of *Van Dusen* for the present case is compelling: while the federal system may strive for convenience through transfers, the federal system - wherever trial is most conveniently had - must mirror the state court in which the action is brought.

Forum non conveniens dismissal is a far more drastic thing than §1404 transfer. "Convenience" simply can't outweigh the required *Erie* result. There is no Federal Rule of Civil Procedure or statute on forum non conveniens - see *Norwood v. Kirkpatrick*, 349 U.S. 29, 31-32 (1955) - and the absence of such a Rule or statute indicates that Congress did not wish to give diversity courts discretion to dismiss on this ground (it is interesting that several states do have such a statute: see, e.g., Uniform Interstate and International Procedure Act §1.05 (Inconvenient Forum), in 13 Uniform Laws Annotated (West 1980 and Supp. 1984), showing adoption by seven jurisdictions). An illustrative contrast is admiralty, where forum non conveniens dismissals are common. Such discretion is proper since the source of jurisdictional doctrines is federal, there is no need to duplicate state policies concerning when a case must be heard, and federal common law doctrines can properly obtain.

Respondents rely heavily on *Byrd* as the one *Erie* case standing for the freedom of federal courts as an independent system, but *Byrd* holds only that the incidents of trial in a federal courthouse may be different from those in the state court across the street:

> The policy of uniform enforcement of state-created rights and obligations, see, e.g. *Guaranty Trust Co. v. York*, supra, cannot in every case exact compliance with a state rule - not bound up with rights and obligations - which disrupts *the federal system of allocating functions between the judge and jury* [citation omitted]. Thus the inquiry here is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court.

Byrd, 356 U.S. at 538 (emphasis added).

Byrd means, broadly, that the relationship between judge and jury is controlled by federal law.

Simply put, the lesson of *Erie* and *all* its progeny is this: in diversity cases, the federal system can independently establish rules governing the manner of trial and similar matters, or can apply Federal Rules of Civil Procedure and statutes. It *cannot* disregard state laws concerning jurisdiction, "door-closing" statutes, and the like. The law of Florida tells petitioners they may try their case in Florida; the Eleventh Circuit, remarkably, has told them they may not. *Van Dusen* tells them that, even if the federal system determines that trial would be more convenient in another one of its courts, Florida law still governs; a forum non conveniens dismissal - based on a federal common law doctrine - tells them something much different.

Petitioners respectfully submit that if the Eleventh Circuit's ruling is allowed to stand - let alone its assertion that a federal court is free from *Erie* constraints until it reaches

the merits of the case - the *Erie* doctrine will have undergone a radical transformation.

III.

FLORIDA CHOICE OF LAW RULES WILL NOT DICTATE DISMISSAL

Respondents' final argument, that a Florida court's reference to Costa Rican law would result in dismissal anyway, is transparently meritless. Florida tort choice-of-law principles dictate application of the *substantive* law of the jurisdiction with the most significant relationship to the tort. *Bishop v. Florida Specialty Paint Co.*, 389 So.2d 999, 1000 (Fla. 1980) (The question certified to the court "invites us to recede from prior decisions of this Court which have stated that the substantive law applicable to personal injury actions is the law of the state where the injury occurred.") While Costa Rican *tort* law may govern the case, jurisdiction has been assumed by the Florida courts and cannot be disturbed by Costa Rican *jurisdictional* law. Contrary to Respondents' assertion, it is perfectly normal for certain issues to be labeled "substantive" in the *Erie* context of state court-federal court relationships, and "procedural" in the context of choice of law between different jurisdictions. Aside from jurisdictional matters, statutes of limitations are a common example.

CONCLUSION

The Eleventh Circuit explicitly found that in this case, unlike the previous cases in which the Erie-forum non conveniens question has been recognized by this Court, the state and federal doctrines conflicted. It rendered an *Erie* holding, already cited as precedent by a lower court, based solely on that conflict. There is simply no way, however,

that anything in *Erie*, its progeny, or the nature of our federal system can be tortured into support for a dismissal on federal common law grounds of a diversity case which would have been tried in state court, and if the holding below passes unreviewed the meaning of *Erie* will have changed drastically. Respondents final contention that reference to Costa Rican law would dictate dismissal is completely without merit.

Florida gives Petitioners a right to try their case, and the federal court system must enforce that right in a diversity case. For the reasons stated, Petitioners respectfully submit that the writ prayed for should issue.

Respectfully submitted,

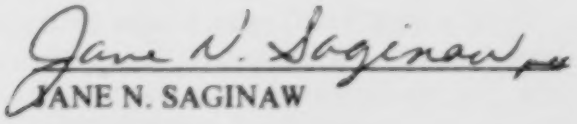
BARON & BUDD
A PROFESSIONAL CORPORATION
8333 Douglas Avenue, 10th Floor
Dallas, Texas 75225
214/369-3605

BY: Jane N. Saginaw, per
JANE N. SAGINAW

BY: Russell W. Budd, per
RUSSELL W. BUDD

CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the foregoing Reply Brief has been mailed to the following counsel of record, pursuant to local rules on this the 29th day of October, 1985.



JANE N. SAGINAW

Michael B. Buckley
Corlett, Killian, Hardeman, McIntosh & Levi
116 West Flagler Street
Miami, Florida 33130

Mr. Bert Ballafant
Shell Oil Company
Legal Department
Litigation Section
Post Office Box 2463, Room 4794
One Shell Plaza
Houston, Texas

Ms. Sherryll Martens Dunaj
Fowler, White, Burnett, Hurley, Banick & Strickroot
City National Bank Building
25 West Flagler Street
Miami, Florida 33130